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No. 96-9187

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1996

ARTHUR BROWN, JR,
Petitioner,

v.

THE STATE OF TEXAS
Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. **WHETHER THE TRIAL COURT VIOLATED BROWN'S RIGHTS UNDER THE FOURTEENTH AND EIGHTH AMENDMENTS WHEN IT REFUSED TO INFORM THE JURY DURING VOIR DIRE OR THE PUNISHMENT PHASE THAT BROWN, IF GIVEN A LIFE SENTENCE WOULD NOT BE ELIGIBLE FOR PAROLE FOR THIRTY-FIVE (35) YEARS?**

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Respondent,[1] the State of Texas, by and through the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The unpublished opinion of the Texas Court of Criminal Appeals affirming Brown's conviction and sentence is attached to Brown's petition as Appendix A. *Brown v. State*, No. 71, 817 (Tex. Crim. App. December 18, 1996). Brown's motion for rehearing was

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[1] For clarity, the respondent will be referred to as "the State" and petitioner Arthur Brown, Jr. as "Brown."

denied by the lower court on February 26, 1997. *See* Petition for Writ of Certiorari at Appendix B (hereinafter "Petition").

JURISDICTION

Brown seeks to invoke this Court's jurisdiction under the provisions of 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Brown bases his claims upon the Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

1. Trial

The Director has lawful custody of Brown pursuant to the judgment and sentence of the 351st District Court of Harris County, Texas, in Cause Number 636535, styled *The State of Texas v. Arthur Brown, Jr.*. The State indicted Brown for the capital offense of murder of more than one person during the same transaction, namely, the deaths of Jessica Quinones, Jose Guadalupe Tovar, Audrey Brown, and Frank Farias, by shooting the complainants with a deadly weapon, namely a firearm. To the charge, Brown entered a plea of "not guilty." 27 SR 16.[2] On November 19, 1993, a jury found Brown "guilty" of the

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[2] "SR" refers to the statement of facts of the state court record, preceded by volume number and followed by page numbers. "Tr" refers to the transcript of the state record of Brown's trial, preceded by volume number with citation to applicable page numbers.

capital offense. 39 SR 153. Following a punishment hearing on that same date, the jury answered the first two special issues affirmatively and the mitigation issue negatively and Brown was sentenced to death.[3] 40 SR 151-55.

2. *Direct appeal*

Brown's conviction and sentence were automatically appealed to the Texas Court of Criminal Appeals. On December 18, 1996, that court affirmed his conviction in an unpublished opinion. *Brown v. State*, No. 71, 817 (Tex. Crim. App. December 18, 1996). On May 27, 1997, this petition for writ of certiorari followed.

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[3] The punishment phase issues read as follows:

SPECIAL ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, Arthur Brown, Jr., would commit criminal acts of violence that would constitute a continuing threat to society?

SPECIAL ISSUE NO. 2

Do you find from the evidence that Arthur Brown, Jr., the Defendant himself, actually caused the death of Jessica Quinones and Jose Guadalupe Tovar and Audrey Brown and Frank Farias intending on killing or if he did not actually cause their death that he intended to kill Jessica Quinones and others and that he anticipated that human life would be taken?

SPECIAL ISSUE NO. 3

Taken into consideration all the evidence including the circumstances of the offense the Defendant's character and background and the personal moral culpability of the Defendant do you find a sufficient mitigating circumstance or circumstances that would warrant that a sentence of life in prison rather than a death sentence be imposed? The jury however need not agree on what particular evidence the Court affirmatively finds on this Special Issue.

40 SR 150-52; *see also* Tex. Code Crim.Proc.Ann. art. 37.071 (West 1997).

B. Statement of Facts

1. The guilt-innocence phase

On the evening of June 20, 1992, at approximately 11:00 p.m., Cedric Chandler, a fireman, and a crew of five other firemen, were dispatched to a home at 4631 Brownstone in Houston, Texas. 27 SR 48-50. When Chandler arrived he found a bloody carnage. 27 SR 52. Chandler was first approached by a man covered in blood who had apparently suffered a gunshot wound to the head. 27 SR 52. The injured man directed Chandler toward other victims strewn about the house. 27 SR 54. In the bathroom, Chandler observed two women (one who was eight months pregnant) tied up, lying on the floor, and shot in the head; at that time, both women were still breathing. 27 SR 55, 77. Chandler then went into a bedroom and discovered a man lying on the floor, tied up and shot in the head. 27 SR 57-58. This man had no pulse. 27 SR 58. In another bedroom, Chandler found another woman tied up and lying on the floor, face down in a pool of blood; she had been shot in the head but was still breathing. 27 SR 59. In that same room was another man, lying on the side of the bed, tied up with a gunshot wound to the head. 27 SR 59. He too had a pulse. 27 SR 60. In all, the crime scene revealed an "execution style killing" with very "few signs of struggle." 27 SR 277. Only two of the victims survived.

One of the survivors was Rachel Tovar. At trial, Rachel testified that her husband, Jose, was a drug dealer who sold "bulk drugs, marijuana and cocaine" and that she ultimately got involved with drug dealing herself. 31 SR 130. Rachel then recounted that

on June 20, 1992, Jose had asked her to contact some customers of his and inform them that he had cocaine to sell. 31 SR 132. Two of these customers were Arthur Brown and Marion Dudley. 31 SR 137. Rachel contacted the two men despite a previous argument she had had with Dudley regarding pricing. 31 SR 138 ([Rachel Tovar:] "he was trying to get a lower price on the deal that they were doing . . . and my husband had told me one price and he wanted it lower.")

That afternoon, at approximately 3:00 p.m., Brown, Dudley and another man, Tony Dunson, arrived at the Tovar house in a beige mini-van. 31 SR 143. The men had a brief conversation with Jose, who informed them that he would have three kilos of cocaine available for sale later in the evening. 31 SR 165. Hearing this, Brown, Dunson, and Dudley left the Tovar's house intending to return later. 31 SR 165. At approximately 9:30 p.m., the men returned, and Jose took them into a back bedroom. 31 SR 168. Shortly thereafter, Rachel, who had been visiting her next door neighbor (Ned Bervis), returned home and encountered Dunson pointing a gun at her. 31 SR 183. Rachel could also hear Dudley yelling at her husband in the back bedroom. 31 SR 178. Dunson ordered Rachel to close and lock the door, he also ordered her into the back bedroom. 31 SR 184. Once there, Rachel saw Dudley pointing a gun to her husband's head and yelling at him, "you stupid Mexican, I never did like you, it's your fault they killed . . . my little brother." 31 SR 186. Rachel had no idea what Dudley was talking about. 31 SR 186.

In the same bedroom were Rachel's daughter-in-law, Jessica, her neighbor Audrey, and her son Frank. 31 SR 186. Shortly after Rachel's arrival, Brown appeared with a kitchen knife and began cutting a bed sheet into strips. 31 SR 187. Soon thereafter, Audrey "told the [men that] she didn't know what was going on," and asked if she "could please leave." 31 SR 192. Dudley responded, "you stupid bitch, you shouldn't have been here." 31 SR 192. Next, Jessica, who was pregnant, began feeling faint and Dudley shouted at her, "you better not go into labor on me." 31 SR 192.

While Dudley was shouting, Brown tied up Frank and Audrey with strips of the bed sheet. 31 SR 193. He then tied up Rachel and placed her in another bedroom and shut the door. 31 SR 194. While there, Rachel heard the doorbell and Jessica's voice as she answered the door. 31 SR 195. Rachel recognized the visitor's voice as Nicholas Anzures, a friend of the Tovar family. Anzures had been greeted by Jessica and a man Anzures later identified as Brown holding a gun to Jessica's head and threatening to kill her. 31 SR 17-18. Brown ordered Anzures into the bedroom with Jose, Audrey, and Frank, and Dudley and Dunson tied him up, gagged him, and laid him on the bed. 31 SR 21.

Shortly thereafter, Brown ordered Jessica into the other bedroom with Rachel. 31 SR 196. Jessica was told to gag Rachel with a piece of bed sheet. 31 SR 197. Next, Rachel heard "somebody struggling to scream" and "two gunshots." 31 SR 197. The next thing that Rachel remembered was that he was "out;" she had been shot by one of the three men. 31 SR 197. When she regained consciousness, Rachel struggled to her feet and began looking

for Jessica and Frank to see if they were alright. 31 SR 198. She found her husband, dead; Anzures injured; Frank, fatally wounded; Jessica, fatally wounded; and Audrey, fatally wounded. 31 SR 199-200. Rachel then crawled out of her house and went to the house next door and told Ned Bervis to call the police. 31 SR 201.

Based on Rachel's description of the events, as well as accounts from other witnesses, the identity of the suspects and their location was easily discovered. 27 SR 305. As a result, warrants for the arrests of Arthur Brown, Marion Dudley, and Tony Dunson were issued and subsequently executed. 27 SR 307-012. Direct and ballistics evidence later revealed that Brown had shot four of the six victims, including Jessica who was eight months pregnant. 31 SR 11-122; 33 SR 179, 279-329; *see also* 40 SR 136.

2. The punishment phase

Jason Mooney, a retired night manager of Shoney's Motel testified that four years previously he had been robbed at gun point by two men who repeatedly threatened to kill him. 40 SR 12-18. Although Mooney could not identify the robbers, he did testify that he had subsequently learned that an arrest had been made. 40 SR 20. In conjunction with Mooney's testimony, the State introduced a certified copy of court records revealing that Brown had been convicted of the offense. *See* State's Exhibit 83.

Matthew Sklar testified next. 40 SR 29. Sklar shared the same cell block with Brown in March 1993 and described how Brown "r[an] the cell block" demanding rent "for staying in his house." 40 SR 31. If you did not pay Brown the money that he had demanded, Sklar

recounted, Brown would fight you. 40 SR 33. Sklar testified that he did pay Brown and felt "like a piece of dirt because of it." 40 SR 34. Sklar ultimately reported the problem to a jailor.

Next, the State offered the testimony of Carlos Lopez, a deputy for the Harris County Sheriff's Department who investigated Sklar's extortion claims. 40 SR 43-45. Deputy Lopez testified that while he was questioning the inmates in Brown's cell block he heard a commotion. 40 SR 47. Walking out into the hallway where Brown was being detained, Deputy Lopez observed Brown "pushing and knocking down [another] [d]eputy" and repeatedly striking him. 40 SR 49. Lopez immediately went to assist the deputy, pushed Brown off him and handcuffed Brown. 40 SR 48. Brown was then removed from the cell block. 40 SR 50.

Deputy Harry Mitchell confirmed Lopez's account; he was the deputy assaulted by Brown. 40 SR 61. Deputy Mitchell testified that before he and Deputy Lopez began questioning Brown's cell block mates, Mitchell ordered Brown out into the hallway with his face to the wall. 40 SR 66. Mitchell then testified that, although Brown went into the hallway, he refused, after repeated requests, to face the wall. 40 SR 67. Deputy Mitchell ultimately grabbed Brown by the arm and shoulders in an attempt to push Brown against the wall. Brown resisted and hit Deputy Mitchell in the eye. 40 SR 69. When Deputy Mitchell fell to the floor as a result of the blow, Brown kept hitting him until restrained by Deputy Lopez. 40 SR 69.

The only testimony offered by Brown was that of Peter Lewis, a law professor at South Texas College of Law. 40 SR 94. Professor Lewis testified as to the phenomenon known as "maturational reform." 40 SR 98. Specifically, Professor Lewis testified that "maturational reform" is a "study that indicates over a period of time that violent offenders, if they're violent in their youth, over time tend to become less and less violent as function of time." 40 SR 98. Professor Lewis further testified that "a structured environment such as custody does seem to play an important factor in this decrease in violence." 40 SR 114.

REASONS FOR DENYING THE WRIT

I.
THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons. Brown advances no compelling reason in this case, and none exist. Further, the issues in this case involve only the application of established constitutional principles to the facts. Thus, the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction.

II.

BROWN'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE TRIAL COURT'S REFUSAL TO INFORM THE JURY DURING VOIR DIRE OR THE PUNISHMENT PHASE THAT BROWN, IF GIVEN A LIFE SENTENCE, WOULD NOT BE ELIGIBLE FOR PAROLE FOR THIRTY-FIVE YEARS.

Brown claims that the trial court violated his rights to due process, equal protection, and his rights under the Eighth Amendment when it refused to permit questioning during voir dire, evidence during the punishment phase, and an instruction in the sentencing charge concerning the fact that if convicted of capital murder and sentenced to life in prison, Brown would have to serve 35 years before becoming parole eligible. In support of these separate but related arguments, Brown relies on this Court's opinion in *Simmons v. South Carolina*, 512 U.S. 154 (1994), and claims that its holding concerning a defendant's legal ineligibility for parole should be extended to facts such as these where a defendant is factually ineligible for parole for at least thirty-five years. But Brown's claims are without merit. Brown has failed to present this Court with any rational, constitutionally viable reason for extending *Simmons* to the current facts.

A. The Fourteenth Amendment Does Not Require That a Capital Jury Be Informed of a Defendant's Factual Ineligibility for Parole.

1. Due process

In *Simmons v. South Carolina*, 512 U.S. 154 (1994) (plurality opinion), the Court addressed a capital defendant's right to inform his jury of the parole implications of a life

sentence under the due process clause of the Fourteenth Amendment. There, the Court held that a capital defendant has a due process right to inform the jury of his *legal ineligibility* for parole where: (1) life without the possibility of parole is the alternative to a death sentence, and (2) future dangerousness is a sentencing inquiry. *Id.* at 156-57 (plurality opinion); *id.* at 182 (O'Connor and Kennedy, JJ., concurring). The concern underlying the *Simmons* holding is that jurors reasonably could be expected to believe that a defendant sentenced to life imprisonment would be eligible for parole at some point, and the absence of an instruction or other information about the defendant's parole ineligibility was misleading--particularly in light of the government's evidence and argument that Simmons posed a future danger to elderly women in "free" society. *Id.* at 165-67 (plurality); *see also id.* at 157-59.

The holding of *Simmons*, however, does not apply to states such as Texas where life without parole is not a sentencing option in capital cases. *See id.* at 165-66 (noting that, while Texas traditionally has prohibited informing juries about a capital defendant's parole eligibility, life without parole is not a sentencing alternative in Texas).

> In a State in which parole is available, how the jury's knowledge of parole eligibility will affect the decision whether or not to impose the death penalty is speculative, and we shall not lightly second-guess a decision whether or not to inform the jury of information regarding parole.

Id. at 168 (plurality opinion). Thus, the language of *Simmons* itself makes clear that the case did not invalidate Texas' prohibition against informing juries about the parole implications of a life sentence in capital cases.

And Brown's suggestion that a failure to invalidate this Texas' prohibition prevents a defendant from presenting "truthful" information to the jury should be rejected. Petition at 12. As the *Simmons* Court made clear, the "logic and effectiveness of petitioner's argument [in that case] naturally depended on the fact that he was legally ineligible for parole." *Id.* at 164-65. In other words, a capital defendant's legal ineligibility for parole must be a matter of law because evidence of such ineligibility is inherently "truthful," and allows the defendant to deny or explain the state's case for future dangerousness. *Id.* at 168. "But if a defendant's ineligibility is a matter of fact, *i.e.*, the defendant probably will not be eligible for parole, then the evidence is purely speculative (maybe even inherently 'untruthful') and therefore cannot positively deny future dangerousness." *Allridge v. Scott*, 41 F.3d 213, 222 (5th Cir. 1994), *cert. denied* 514 U.S. 1108 (1995). The jury is left only to speculate about what a parole board may, or may not do thirty-five years hence. In *Simmons*, the Court, relying on *California v. Ramos*, 463 U.S. 992, 1014 (1983), reaffirmed that states can properly choose to prevent a jury from engaging in such speculation as a means of

providing greater protections in their criminal justice systems than constitutionally required.[4] *Id* (citing *Ramos*, 463 U.S. at 1014.)

Finally, application of *Simmons'* legal ineligibility for parole holding to the present facts would be misguided as the concept of future dangerousness as recognized in Texas' capital-sentencing scheme, and as presented to the jury in the instant case, is distinguishable from the concept of future dangerousness argued by the South Carolina prosecutor in *Simmons*. The prosecutor in *Simmons* "urge[d] the jury to sentence the defendant to death so that he [would] not be a danger to the public if released from prison." *Simmons*, 512 U.S. at 162. Under the Texas scheme, in contrast, a prosecutor urges a jury to answer in the affirmative a specific question, "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. Ann. art. 37.071 § 2(b)(1). Texas courts have defined "society" in this context to include both prison and non-prison populations. *Jones v. State*, 843 S.W.2d 487, 495 (Tex. Crim. App. 1991), *cert. denied*, 507 S. Ct. 1035 (1993); *Boyd v. State*, 811 S.W.2d 105, 118 n.12 (Tex. Crim. App.), *cert. denied*, 502 U.S. 971 (1991). Thus, even if Texas had

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[4] Indeed, it is far from clear that informing the jury of early release and parole is beneficial to capital defendants. In *Ramos*, for example, the defendants complained that such information biased the jury in favor of death. *Ramos*, 463 U.S. at 1010-11. In *King v. Lynaugh*, 850 F.2d 1055, 1061 (5th Cir. 1988) (en banc), *cert. denied*, 488 U.S. 1019 (1989), the Fifth Circuit observed that knowledge that a capital murderer could be released from prison in twenty years is not necessarily likely to reassure jurors and, in fact, might incline them to impose the death sentence. It is precisely because the issue is so speculative that this Court concluded in *Simmons* that whether to inform juries of parole consequences is a decision better left to the states. *Simmons*, 512 U.S. at 168-69.

the "life without parole" sentencing alternative to the death penalty as seen in *Simmons*, this case would be distinguishable because the prosecutor's argument in *Simmons* would be accurate under Texas' definition of "society." Accordingly, Brown's attempt to minimize the difference between legal and factual ineligibility for parole — "the sole difference between life without possibility of parole and life without parole is a degree" -- is of no help to him in this State. Unless one is willing to assume, improperly, that Brown had a constitutional right to undervalue the prison population *vis a vis* society at large, the degree of difference between factual ineligibility parole versus legal ineligibility for parole is too substantial to warrant the due process relief that Brown requests.

2. Equal protection.

Likewise, Brown's equal protection argument must fail. More particularly, there is no legal basis for Brown's assertion that the State unconstitutionally discriminates between capital and non-capital defendants because juries in non-capital cases are informed of the details regarding a defendant's eligibility for parole. *See* Petition at 15.

Under the Equal Protection Clause of the Fourteenth Amendment, when a classification does not implicate a fundamental right, or operate to the detriment of a suspect class, the proper standard for review is to determine whether there is a rational basis for the different treatment, which is to say, whether the classification bears a rational relationship to a legitimate state interest. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); *Clements v. Fashing*, 457 U.S. 957, 963 (1982); *City of New Orleans v. Dukes*,

427 U.S. 297, 303 (1976). "Rational basis" review is highly deferential towards the states when economic or social legislation is at issue. *Dallas v. Stanglin*, 490 U.S. 19, 26-27 (1989); *Cleburne*, 473 U.S. at 440. Courts also defer to penal legislation. *See McGowan v. Maryland*, 366 U.S. 420, 422-428 (1961). Accordingly, this Court should not strike down a classification unless it is "based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them." *Clements*, 457 U.S. at 963.

Brown cites no authority to support the proposition that the State's decision to refrain from informing a capital sentencing jury of the number of years he would have to serve before becoming eligible for parole implicates a fundamental constitutional right. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (noting fundamental substantive rights are those such as the right to marriage and procreation); *see also Simmons*, 512 U.S. at 168 (noting that states in which parole is available may reasonably decide to keep such sentencing information from capital sentencing jury). Nor does Brown provide argument or authority for the proposition that capital murderers constitute a suspect class that will justify strict scrutiny. This Court has never recognized criminal defendants in general, or capital defendants in particular, as constituting a suspect class. Thus, Brown's equal protection claim is properly reviewed under the "rational basis" standard.

Under section 4 of article 37.07 of the Texas Code of Criminal Procedure, Texas courts have consistently instructed juries in non-capital cases with respect to a defendant's eligibility

for parole and certain calculations relevant to parole guidelines, but do not do so in capital cases. However, there are persuasive, logical reasons for the State to allow a jury to consider parole in non-capital cases but to preclude it from doing so in capital cases. The sentencing procedures in capital and non-capital cases are distinctly different. In non-capital cases, the sentencer is free to assess any sentence that is within the range delineated by statute. TEX. CODE CRIM. PROC. ANN. art. 37.07; *see also* TEX. PENAL CODE ANN. §§ 12.31,12.34 (specifying ranges of punishment for classes of felony offenders). Thus, in non-capital cases, the jury decides the specific term of years for which the defendant will be incarcerated. The period of time a non-capital defendant will actually serve in jail is effected, however, by parole laws. Given this circumstance, it is appropriate for the jury to be aware of the parole process and to take it into consideration in making a decision as to the term of years the defendant should serve.

In capital cases, on the other hand, the jury's discretion is guided by its consideration of the special issues, and it is the responses to the special issues that determine punishment in a particular case. TEX. CODE CRIM. PROC. ANN. art. 37.071. The special issues focus the jury on the gravity of the offense and the defendant's propensities for violent crime. The special issues require the jury to focus on the defendant's background and character and the circumstances of the crime, without injecting into the process speculation about whether, and if so when, the defendant might be released on parole if he were given a life sentence. Indeed, for a jury to be instructed on the ramifications of parole law could well work to the

disadvantage of a capital defendant, for the jury would be made explicitly aware that a life sentence does not necessarily mean life. *See King*, 850 F.2d at 1061 (knowledge that a capital murderer released from prison in twenty years is not necessarily likely to reassure jurors and, in fact, might incline them to impose a death sentence.) Accordingly, the State's differing treatment of capital and non-capital defendants did not violate Brown's equal protection rights.

B. The Eighth Amendment does not require that a Capital Jury be Informed of a Defendant's Factual Ineligibility for Parole.

As an initial matter, the general relevance or admissibility of evidence, whether it be at the guilt/innocence or punishment phase of trial, does not implicate Eighth Amendment concerns. Rather, this issue is properly analyzed in the context of the Due Process clause of the Fourteenth Amendment. *See Romano v. Oklahoma*, 512 U.S. 1, 10 (1994) (rejecting petitioner's attempt to "fashion general evidentiary rules under the guise of the Eighth Amendment, which would govern the admissibility of evidence at capital sentencing proceedings."); *Skipper v. South Carolina*, 476 U.S. 1, 11 (1986) (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring) (noting that "the States, and not this Court, retain 'the traditional authority' to determine what particular evidence within the broad categories described in *Lockett* [*v. Ohio*, 438 U.S. 586 (1978) (plurality opinion)] and *Eddings* [*v. Oklahoma*, 455 U.S. 104 (1982)] is relevant in the first instance.") As in *Skipper*, this Court chose to resolve the capital-sentencing issue in *Simmons* on the basis of due process rather

than the Eighth Amendment. *See Skipper*, 476 U.S. at 11; *see also Gardner v. Florida*, 430 U.S. 349 (1977). The *Simmons* Court expressly declined to opine whether the result reached was also compelled by the Eighth Amendment. *Simmons*, 512 U.S. at 161 n.4.

Further, there is no basis for speculating that, in this context, Eighth Amendment protections extend beyond those of due process. Quite the contrary, the Court's Eighth Amendment jurisprudence with respect to evidentiary matters has, heretofore, been limited to identifying the classes or types of potentially mitigating evidence to which the jury must be allowed to give mitigating effect and the procedures that are sufficient for this purpose. *California v. Ramos*, 463 U.S. 992, 999 (1983) (noting that, in construing the Eighth Amendment, the Court primarily has been concerned with procedures by which states impose death sentences and not substantive factors juries are allowed to consider). In particular, the Eighth Amendment requires that "'the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (emphasis in original), *quoting Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion). *Lockett* and *Eddings* reflect the view that a capital defendant, like a non-capital defendant, is entitled to an individualized sentencing decision that is a reasoned moral response to the defendant's personal culpability. *E.g.*, *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring); *California v. Brown*, 479 U.S. 538, 545 (1987). Once a

defendant has been determined to be "eligible" for the death sentence, the Eighth Amendment requirements for the "selection" or individualized sentencing determination are satisfied if the procedures "allow the jury to consider the character and record of the defendant and the circumstances of the crime." *Tuilaepa v. California*, 512 U.S. 967, 973 (1994); *see also Saffle v. Parks*, 494 U.S. 484, 494 (1990). Further, the Court has held that "there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Boyde v. California*, 494 U.S. 370, 377 (1990), *quoting Franklin*, 487 U.S. at 181 (plurality opinion).

The Eighth Amendment issue raised by Brown does not involve, however, the admission or exclusion of any of these categories of potentially relevant mitigating evidence; the state's parole laws are not in any way part of Brown's character, his record, or the circumstances of his offense. *See Smith v. State*, 898 S.W.2d 838, 853 (Tex. Crim. App.) (the state's parole laws are not in any way part of a capital defendant's character, record, or circumstances of the offense), *citing Ramos*, 463 U.S. at 1021 (Marshall, J., dissenting), *cert. denied*, 116 S. Ct. 131 (1995). Further, a parole instruction in no way relates to Brown's culpability and, therefore, could not render him less *deserving* of the death penalty. In other words, if the purpose of an individualized sentencing determination is to distinguish between people who deserve the death penalty and those who do not, *see Eddings*, 455 U.S. at 112, then evidence of a parole law that applies to an entire class of capital defendants would not

further this purpose. Thus, Brown has failed to demonstrate how informing the jury on the applicable parole law would have promoted an individualized sentencing determination that death was or was not "the appropriate punishment" in his case. *Lockett*, 438 U.S. at 601. Whether death was an appropriate punishment in this case has nothing to do with Texas parole law, but rather, with whether Brown was more deserving of the death penalty, based on his character, record and circumstances of his offense, than any other capital murder defendant. Therefore, Brown has not shown that the state limited his ability to present constitutionally mitigating evidence at the punishment phase of his trial.

Nor is there a reasonable likelihood that the absence of such an information/evidence, *i.e.*, that Brown could not be paroled for thirty-five years, precluded the jury from effectively considering the mitigating evidence that was presented. Brown contends that an instruction or evidence about his parole eligibility was necessary in order to allow the jury to consider his mitigating evidence that, if credited, indicated that his violent tendencies could diminish over time. But evidence that Brown would outgrow his violent tendencies, if credited, possessed mitigating relevance to the second special issue. *Graham v. Collins,* 506 U.S. 461, 476 (1993). That the jury answered the future dangerousness issue "yes" does not reflect that it was precluded from effectively considering Brown's evidence but, rather, that the remote possibility that Brown might not always be a violent person was insufficient to raise a reasonable doubt that he would pose a continuing threat to society, including prison society.

Finally, Brown's attempt argue that the lower courts need guidance on this issue is wholly without support. He acknowledges that "Texas and the Fifth Circuit consistently have read *Simmons* narrowly as applying only to cases involving life-without-parole as an alternative to the death penalty situations," but he then tries to show a conflict with these decisions by citing one New Mexico Supreme Court case in which the court, *clearly* in *dicta*, stated it agreed with Justice Souter's Eighth Amendment analysis of the issue in his *Simmons* concurring opinion. Petition at 15. *See also Clark v. Tansy*, 882 P.2d 527, 531 (N.M. 1994) ("[B]ecause *Simmons* points to a resolution of Clark's habeas petition on due process grounds, and because we hesitate to decide his petition according to the very Eighth Amendment principles on which a majority of the Supreme Court specifically declined to express an opinion, we do not decide Clark's petition under the 'cruel and unusual punishment' provision of the Eighth Amendment . . . .") But one case does not a "conflict" make in terms of this Court's discretion to grant review. Furthermore, as demonstrated, the *Clark* court specifically did not render a holding on this issue. *Clark*, 882 P.2d at 531. Accordingly, Brown has not demonstrated any need for guidance from this Court regarding the *Simmons* analysis.

Brown's Eighth Amendment argument must be rejected.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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August 26, 1997

The Honorable William K. Suter
Clerk, United States Supreme Court
Office of the Clerk
1 First Street, N.E.
Washington, D.C. 20543

Re: *Arthur Brown, Jr. v. The State of Texas*
No. 96-9187

Dear Mr. Suter:

Enclosed for filing with the papers in the above styled cause are the original and nine copies of Respondent's Brief in Opposition. Also enclosed is the Proof of Service Form. Please indicate the date of filing on the enclosed copy of this letter and return it to me in the post-paid envelope provided.

By copy of this letter, I am forwarding a copy of said brief to counsel for Petitioner.

Thank you for your kind assistance in this matter.

Yours truly,

ELIZABETH A. MARTIN
Assistant Attorney General
(512) 936-1600

EAM/jgw
Enclosures
c: Tom Moran
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No. 96-9187

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1996

ARTHUR BROWN, JR,
Petitioner,

v.

THE STATE OF TEXAS
Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

PROOF OF SERVICE

I hereby certify that on the 26th day of August, 1997, one copy of **RESPONDENT'S BRIEF IN OPPOSITION** was mailed, postage prepaid, to Tom Moran, 11 Greenway Plaza, #3112, Houston, Texas 77046. All parties required to be served have been served. I am a member of the Bar of this Court.

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